boarding'' and certain other coercive interrogation techniques are expressly prohibited by the Army Field Manual on Intelligence Interrogation, and Congress specifically legislated in the DTA that no person in the custody or control of the Department of Defense (''DOD'') or held in a DOD facility may be subject to any interrogation techniques not authorized and listed in the Manual.

In the absence of legislation expressly banning certain interrogation techniques in all circumstances, one must consider whether a particular technique complies with relevant legal standards. Below, I provide a summary of the type of analysis that I would undertake, were I presented as Attorney General with the question of whether coercive interrogation techniques, including ''waterboarding'' as described in your letter, would constitute torture, cruel, inhuman or degrading treatment, or a violation of Common Article 3 of the Geneva Conventions.

The statutory elements of torture are set forth in 18 U.S.C. §2340. By the terms of the statute, whether a particular technique is torture would turn principally on whether it is specifically intended to cause (a) severe physical pain or suffering, or (b) prolonged mental harm resulting from certain specified threats or acts. If, after being briefed, I determine that a particular technique satisfies the elements of section 2340, I would conclude that the technique violated the law.

I note that the Department of Justice published its interpretation of 18 U.S.C. §2340 in a December 30, 2004 memorandum to then-Deputy Attorney General James B. Comey, which superseded the memorandum of August 1, 2002 that I testified was a ''mistake.'' I understand that the December 30, 2004 memorandum remains the Department's prevailing interpretation of section 2340. Although the December 30, 2004 memorandum to Mr. Comey does not discuss any specific techniques, it does state that ''[w]hile we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.''

Even if a particular technique did not constitute torture under 18 U.S.C. §2340, I would have to consider also whether it nevertheless would be prohibited as ''cruel, inhuman or degrading treatment'' as set forth in the DTA and the Military Commissions Act (''MCA'')—enacted after the Department of Justice's December 30, 2004 memorandum to Mr. Comey—which extended the Convention Against Torture's prohibition on ''cruel, inhuman or degrading treatment'' to individuals in United States custody regardless of location or nationality. Congress specified in those statutes, as the Senate had in consenting to the ratification of the Convention Against Torture, that the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution would control our interpretation of the phrase ''cruel, inhuman or degrading treatment.''

The Fifth Amendment is likely most relevant to an inquiry under the DTA and MCA into the lawfulness of an interrogation technique used against alien enemy combatants held abroad, and the Supreme Court has established the well-known ''shocks the conscience'' to determine whether particular government conduct is consistent with the Fifth Amendment's due process guarantees. *See County of Sacramento* v. *Lewis*, 523 U.S. 833, 850 (1998); *Rochin* v. *California*, 342 U.S. 165, 174 (1952). A legal opinion on whether any interrogation technique shocks the conscience such that it constitutes cruel, inhuman or degrading treatment requires an understanding of the relevant facts and circumstances of the technique's past or proposed use. This is the test mandated by the Supreme Court itself in *County of Sacramento* v. *Lewis* in which it wrote that ''our concern with preserving the constitutional proportions of substantive due process *demands an exact analysis of circumstances* before any abuse of power is condemned as conscience shocking.'' 523 U.S. 833, 850 (1998) (emphasis added). As the Supreme Court has explained, a court first considers whether the conduct is ''arbitrary in the constitutional sense,'' a test that asks whether the conduct is proportionate to the governmental interests involved. *Id*. at 847. In addition, the court must conduct an objective inquiry into whether the conduct at issue is ''egregious'' or ''outrageous'' in light of ''traditional executive behavior and contemporary practices.'' *Id*. at 847 n.8. This inquiry requires a review of executive practice so as to determine what the United States has traditionally considered to be out of bounds, and it makes clear that there are some acts that would be prohibited regardless of the surrounding circumstances.

I would have to ensure also that any technique complies with our Nation's obligations under the Geneva Conventions, including those acts, such as murder, mutilation, rape, and cruel or inhuman treatment, that Congress has forbidden as grave breaches of Common Article 3 under the War Crimes Act. With respect to any coercive interrogation technique, the prohibition on ''cruel or inhuman treatment'' would be of particular relevance. That statute, similar in structure to 18 U.S.C. §2340, prohibits acts intended (a) to cause serious physical pain or suffering, or (b) serious and non-transitory mental harm resulting from certain specific threats or acts. Also, I would have to consider whether there would be a violation of the additional prohibitions imposed by Executive Order 13440, which includes a prohibition of willful and outrageous personal abuse inflicted for the purpose of humiliating and degrading the detainee.

As I testified, any discussion of coercive interrogation techniques necessarily involves a discussion of and a choice among bad alternatives. I was and remain loath to discuss and opine on any of those alternatives at this stage for the following three principal reasons: First, to repeat, I have not been made aware of the details of any interrogation program to the extent that any such program may be classified, and thus do not know what techniques may be involved in any such program that some may find analogous or comparable to the coercive techniques presented to me at the hearing and in your letter. Second, I would not want any *uninformed* statement of mine made during a confirmation process to present our own professional interrogators in the field, who must perform their duty under the most stressful conditions, or those charged with reviewing their conduct, with a perceived threat that any conduct of theirs, past or present, that was based on authorizations supported by the Department of Justice could place them in personal legal jeopardy. Third, for the reasons that I believe our intelligence community has explained in detail, I would not want any statement of mine to provide our enemies with a window into the limits or contours of any interrogation program we may have in place and thereby assist them in training to resist the techniques we actually may use.

I emphasize in closing this answer that nothing set forth above, or in my testimony, should be read as an approval of the interrogation techniques presented to me at the hearing or in your letter, or any comparable technique. Some of you told me at the hearing or in private meetings that you hoped and expected that, if confirmed, I would exercise my independent judgment when providing advice to the President, regardless of whether that advice was what the President wanted to hear. I told you that it would be irresponsible for me to do anything less. It would be no less irresponsible for me to seek confirmation by providing an uninformed legal opinion based on hypothetical facts and circumstances.

As I testified, if confirmed I will review any coercive interrogation techniques currently used by the United States Government and the legal analysis authorizing their use to assess whether such techniques comply with the law. If, after such a review, I determine that any technique is unlawful, I will not hesitate to so advise the President and will rescind or correct any legal opinion of the Department of Justice that supports use of the technique. I view this as entirely consistent with my commitment to provide independent judgment on all issues. That is my commitment and pledge to the President, to the Congress, and to the American people. Each and all should expect no less from their Attorney General.

Sincerely,

MICHAEL B. MUKASEY.

The PRESIDING OFFICER (Mr. BROWN). The Senator from Texas is recognized.

Mr. CORNYN. Mr. President, may I inquire how much more time this side of the aisle has in morning business?

The PRESIDING OFFICER. The Senator from Texas would have 12 minutes.

SCHIP

Mr. CORNYN. Mr. President, I realize today is Halloween, so millions of children all over the globe will be showing up at our homes, saying ''trick or treat.'' Unfortunately, Congress has been up to more tricks than treats lately. I say that with a sense of irony but also a sense of great disappointment.

Almost 3 weeks ago, on October 11, I sent a letter to Senator REID, the Senate majority leader, and the Speaker of the House, Congresswoman PELOSI, urging them to work across the aisle with Republicans and Democrats to come up with a sensible compromise on the reauthorization of the State Children's Health Insurance Program.

Today, as we know, is October 31, Halloween, and we have still not been able to come up with a compromise that is reasonable and fiscally responsible which the President will sign. The families and the children in my State of Texas who are, unfortunately, put on edge and suffering some sense of anxiety wondering whether this important program will continue to serve the needs of low-income children are being unfortunately taken advantage of and disadvantaged.

Why in the world would Congress play this kind of game and make those who are the most vulnerable among us the most anxious about their future and whether they will be able to get the health care which everyone in Congress believes low-income children ought to receive?

Instead of negotiating and trying to come up with a sensible compromise,

we find the leadership in the House of Representatives rushing through a bill with little bipartisan input. Rather than trying to hammer out a meaningful compromise, we find a bill that actually costs just as much but serves fewer children and which otherwise makes minor tweaks to the legislation.

This bill clearly misses the mark and fails to reauthorize the State Children's Health Insurance Program according to the original intent of the program, which is putting low-income children first, low-income children whose families earn too much money to qualify for Medicaid—that is up to 100 percent of the poverty level—but who make up to 200 percent of the poverty level. Unfortunately, due to the inaction of the U.S. Congress, we have 700,000 low-income Texas children who qualify for Medicaid, who qualify for SCHIP, but who are currently not signed up and receiving those benefits. Instead, Congress is taking its eye off the ball and exploding this sensible program that deserves to be authorized by raising the eligibility cap to 300 percent of the poverty level but doing nothing—I reiterate—nothing to ensure that low-income children, including 700,000 low-income children in Texas, have coverage first before we grow the program to higher income levels and cover adults as well.

In fact, this legislation repeals the requirement that 95 percent of low-income children below 200 percent of the poverty level be covered first before extending coverage to children from higher income families. I do not believe this provision has the interests of the children this legislation was designed to serve put first. Instead, I think it puts partisan political interests ahead of the interests of low-income children.

All of this has come, of course, in response to the President's veto of the original SCHIP reauthorization, a proposal that failed to encourage participation among the poorest of our children, and instead expanded coverage to children of higher income families as well as adults. Rather than being an obstacle, the President's veto should be looked at as an opportunity to reengage on a bipartisan basis to come up with a solution. It is no wonder that Congress's approval ratings are around the 11-percent range. When the people across America look to Washington to find solutions to their problems, what do they find? They find partisan posturing and precious few results.

This is an opportunity to deliver a result and to keep a promise that we, on a bipartisan basis, have made to the poorest children in our country. What should we have asked ourselves as to what we should do? While we leave our children and their families blowing in the wind, will we turn their lives into campaign promises or will we, instead, keep our word that we came here to serve the needs of the American people, and particularly the most vulnerable among us, by continuing this important program and making sure that poor kids get health care first, before we look at growing this program to cover other more well-to-do children or perhaps even adults as are covered currently in four States.

The recent debate on SCHIP has focused too much on our political gains and not enough on the well-being of our poor children. This bill has become another political football in a game that has been raging for months, but, unlike any other game that I am familiar with, this game has only an imaginary scoreboard, the results are arbitrary, and nothing—nothing—it appears, is out of bounds.

Whenever a health care package for low-income children is delayed because some want to engage in partisan games and political posturing, you know things have gone too far.

They say the definition of insanity is doing the same thing over and over again and yet expecting different results. Well, by that definition, this is insanity. We know the original bill that was vetoed by the President was because it strayed far from the original objectives. It was not funded on a source of revenue that could be expected to pay for this radical expansion of the current program by 140 percent.

Well, we know the reasons the President vetoed that legislation. And what does the leadership in the House of Representatives decide to do? Well, they decide to essentially do the same thing again and dare the President, one more time, to veto this legislation.

It is clear this is not, by definition, good-faith negotiation and attempt, on a bipartisan basis, to solve this very real problem. Rather than give voice to those who want to find a better and more sensible solution to this problem, we will find ourselves this afternoon simply voting on another substantially flawed bill, which the President has likewise promised to veto.

Of course, when the bill returns from its short and uneventful trip to the White House, we will not fail to see the video cameras paraded out for the press conferences to talk once more about how the President and those who voted against this bill have heartlessly blocked it.

It has become a cynical ploy. Everybody gets it. Only people inside the beltway in Washington or inside this Chamber who continue to engage in partisan posturing do not get it. The American people see through it as clearly as you would expect.

The truth is no one wants to see SCHIP reauthorized more than the Members of the Congress, on a bipartisan basis. It is an enormously successful program passed with broad bipartisan support in 1997, and it should be continued. As a matter of fact, those of us who voted against the bill the President vetoed believe we should continue the program, and we should add at least $10 billion to the original funding in order to cover more and more low-income kids.

But even more important than that, in my State of Texas, half of the uninsured children in Texas who are eligible for Medicaid and SCHIP under the current program are not signed up. What is Congress doing to make sure those children are reached out to, that their parents are assisted in filling out the paperwork so they can qualify for this program? Precious little. Precious little.

Congress continues to add 140 percent to the current authority under this program, to take money out of necessary outreach to reach out to the low-income kids and to explode this program into one that covers people making much more money than double the Federal level of poverty.

I will do everything in my power to ensure these children get the health care they need. The problem is, as I and many of my colleagues have pointed out numerous times, this bill does not make these children a priority. It does not make these children a priority but, rather, an afterthought.

Instead, it puts other children, many of whom already enjoy the benefits of private health insurance, in competition with these low-income children for CHIP coverage. The result is that children who most need it get crowded out in favor of children who already have private health insurance.

This bill simply does not fix the problem. It raises the eligibility for CHIP enrollment without a concerted effort to enroll those children who are currently eligible first. Additionally, this new bill does nothing to close the loopholes on income disregard. Now, that is a fancy way of saying disregarding the rules. You say the rules are one thing, but you come behind it later on and say: Well, forget some of these rules when it comes to qualifying income.

This bill is another example of that kind of gamesmanship under the title of income disregards which allows States the ability to, in effect, define a family's income by saying: We will not take into account all income. We are going to disregard some so you will qualify for this Federal Government taxpayer-paid-for benefit.

This loophole would allow States to actually exceed 300 percent of poverty level by disregarding part of the family's income.

Neither does this bill address the crowd-out effect which is expected to shift 2 million children from private coverage to government-run health care. There are a number of other problems with this bill that do nothing to eliminate the document fraud and identity theft that would allow noncitizens to qualify for the benefits under this legislation.

We can do better. We must do better. But we cannot do better as long as we continue to engage in this partisan gamesmanship and political posturing. Unfortunately, it is the low-income children, among the most vulnerable in our country, who are the ones who are left wondering: Is Congress going to act in their best interests?

Unfortunately, they have seen very little evidence so far that they are our

No. 1 priority, as they should be. Instead, partisan politics appear to be the No. 1 priority, and those children appear to be something left behind.

I yield the floor.

The PRESIDING OFFICER. The Senator from New Jersey is recognized.

Mr. MENENDEZ. Mr. President, I ask unanimous consent for the rest of the Democratic time in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

REPUBLICAN OBSTRUCTIONISM

Mr. MENENDEZ. Mr. President, right up the street from here, right up Pennsylvania Avenue, is the White House. It is not far, a little over a mile. But what has been made abundantly clear over the past 10 months since Congress changed hands, what has been made abundantly clear is that when it comes to the priorities of the families of this Nation, when it comes to the values they hold, the distance between here and the White House is many miles.

Americans have seen for themselves what we in Congress want to do for them. They have seen some truly meaningful and landmark initiatives achieved on behalf of American families: The 9/11 Commission bill, bringing security to all our communities; the most sweeping ethics reform in a generation, extracting lobbying influence from the policies that affect all of us; the first increase in the minimum wage, the first raise for American workers in more than a decade; and the most significant college affordability package since the GI bill, because we recognize that a good education is the great equalizer.

But that is not all we are trying to do for middle-class Americans, for working Americans, for families in this country. That is the tip of the iceberg. We want to help American families by investing in security, education, and health care, and we have legislation to do that. Yes, there will be plenty more ideas, plenty more initiatives, plenty more investments in the people of this country whom we stand together to support but only to have the President and his friends in Congress block our progress.

Time after time, a majority of the Members of this body have lined up behind truly important legislation, only to have the President take out his veto pen or our Republican colleagues in the Senate strike up a filibuster.

Yesterday I saw President Bush, flanked by some of his top allies from Congress, complaining about what he claims Congress has not done this year. It takes a lot of nerve for the President to say that, when he received from this Congress landmark security legislation, landmark education legislation, landmark ethics reforms, and the first minimum wage raise in a decade. He signed them all into law, all within 10 months.

It takes a lot of nerve for President Bush to say we are wasting time, when he, along with his allies, has refused the children's health legislation, stem cell research legislation, and legislation to change the course in Iraq.

I know it is Halloween, but the legislative graveyard for which the President is the grim reaper is not a trick or a treat. It is downright scary that the President can be so disconnected from the values and hopes of mainstream America.

Ask the American people: What would they rather us do in Washington—stand up for lifesaving research, lower energy costs, get our troops out of Iraq or kill initiative after initiative that would benefit American families? In Congress, we are going to try to give the President what we call in golf a mulligan on one of the most important investments we can make in our country, the health of our children. The first time, he vetoes it, sending the message that millions of children who have nowhere else to turn are unworthy of a strong Federal commitment.

We believe that is fundamentally wrong. The President has to choose if he is going to sign it into law or again write a big ''no'' on an investment in America's children. This is a President who says, no, no, no, when it comes to investing in our families, but yes, yes, yes, when it comes to more troops, more time, more money for his stay-the-course plan in Iraq.

This is a President who does not see the irony in sticking out the one hand to ask for $200 billion for Iraq this year, while using the other hand to veto health coverage for poor American children. This is a President who has no problem with killing a child's health bill that would have been paid for with 3½ months of Iraq funding. This is a President who says: We are fighting them over there so we do not have to fight them over here, when what he means is: We are spending all our money over there, and we do not have it to spend here.

In Congress, we want a strong investment in children's health care, in stem cell research, in changing the course in Iraq. We have offered those to the President. He has rejected it. The President and his allies seem to want to stay the course in Iraq and not much else.

Well, America is going to see a lot of ghouls and goblins tonight. But what is truly scary is that the legislative grim reaper that threatens millions of families without health care insurance, the demon of oil addiction, and the specter of an endless war, are not going to be gone when we wake up. That is the reality we face. That is why we continue to challenge to change the course.

I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. BROWN. I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. DORGAN). Without objection, it is so ordered.

Mr. BROWN. I ask unanimous consent to speak for no more than 5 minutes as in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

CONSUMER PRODUCT SAFETY COMMISSION

Mr. BROWN. Mr. President, our Nation's haphazard trade policy too often allows contaminated food and dangerous toys onto our shelves and into our homes, and this administration has done little to curb the toxic tide.

Earlier this month, I asked Ohio's Ashland University chemistry Professor Jeff Weidenhamer to test 22 Halloween products for lead. Three products tested were found to contain high lead levels. Acceptable levels of lead, according to the Consumer Product Safety Commission, are 600 parts per million for adults. According to CPSC, there is no acceptable lead level for children. A Halloween Frankenstein cup that Professor Weidenhamer tested—presumably a cup that may end up in a child's mouth—contained 39,000 parts per million versus 600, which is acceptable for an adult, and zero acceptable for a child.

For more than 40 years, parents trusted that their children's toys were safe from lead. The safety net secured to help our families is being systematically dismantled, as the Presiding Officer, the Senator from North Dakota, has pointed out so well, by our Nation's failed trade policies and an apathetic administration. Forty years ago, we banned lead in paint. Now we must ban lead in toys. I am a cosponsor of legislation with Senator OBAMA that would do that.

While a ban on lead in toys is an important step, it doesn't get at the heart of the problem—our failed trade policy. Until we get tough on enforcing safety standards abroad, we won't be able to prevent contaminated products from ending up on store shelves across the country and in our homes.

Distributors seeking low-cost products stretch supply chains to China and cut costs; that is, American companies that import go to China and other countries and push them to cut costs, to cut corners, and then those products are brought back into the United States. That means lead paint in toys because it is cheaper to buy and to apply, it means too often contaminated products in our homes, and it means zero accountability.

We have not made the importers, the contractors, or the Government accountable because of cuts at the Consumer Product Safety Commission and because we have a top Commissioner there who has simply weakened that agency and abdicated responsibility. As yesterday's report highlighted, we must do more to ensure the Consumer Product Safety Commission has what it needs to do its job.